BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parents' Fifth Amendment privilege against self-incrimination?

II. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT:	7
I. A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON COMPELS INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.	7
II. THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD AND IS NOT OVERCOME BY ANY IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY.	11
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
California v. *Byers*, 402 U.S. 424 (1971)	13
Commonwealth v. *Hughes*, 383 Mass. 583, 404 N.E.2d 1239 (1980), cert. denied 449 U.S. 900 (1980)	6, 8, 9
Curcio v. *U.S.*, 354 U.S. 118 (1957)	11
Doe v. *United States*, 487 U.S. ___, 101 L. Ed. 2d 184, 198 (1988)	6, 8
Flager v. *Derickson*, 134 Ariz. 229, 665 P.2d 349 (1982)	6, 10
Goldsmith v. *Superior Court In & For Shasta*, 152 Cal. App. 3d 78, 199 Cal. Rptr. 366 (1984)	8
Hoffman v. *United States*, 341 U.S. 479 (1951)	11
Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977)	12
Lefkowitz v. *Turley*, 414 U.S. 70 (1973)	12
Murphy v. *Waterfront Commission of New York*, 378 U.S. 52 (1964)	7, 10
New Jersey v. *Portash*, 440 U.S. 450 (1979)	13
New York v. *Quarles*, 467 U.S. 649 (1984)	13
Orozco v. *Texas*, 394 U.S. 324 (1969)	17
People v. *Salinas*, 131 Cal. App. 3rd 925, 182 Cal. Rptr. 683 (1982)	13
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	15
Schmerber v. *California*, 384 U.S. 757 (1966)	9
Slochower v. *Board of Education of New York*, 350 U.S. 556 (1956)	10
The King v. *Lord George Gordon*, 99 Eng. Rep. 372 (1781)	12
United States v. *White*, 322 U.S. 694 (1944)	12
CONSTITUTIONAL PROVISIONS AND STATUTES	
United States Constitution	
Fifth Amendment	6, 13
Fourteenth Amendment	7, 13
Md. Code Ann., Courts and Judicial Proceedings Art., Section 3-831	7, 16
OTHER AUTHORITIES	
E. Griswold, *The Fifth Amendment Today* (1955)	19
Friendly, *"The Fifth Amendment Tomorrow: The Case for Constitutional Change,"* 37 Cinn. L. Rev. 671 (1968)	15
Gallick Reports (1737)	17
L. Levy, *Origins of the Fifth Amendment* (2d ed. 1986).	12
P. Hoffer and N. Hull, *Murdering Mothers: Infanticide in England and New England*, 1558-1803 (1984)	17
W. Triplett, *Flowering of the Bamboo* (1985)	19

STATEMENT OF THE CASE

Respondent accepts the facts as stated by Petitioners except as modified, explained or supplemented. These facts are intended to put the case in proper context by demonstrating the ample support for the concession made by the Department of Social Services that Respondent has a reasonable fear of incrimination. (Pt. (DSS) B. at 12 n.13).

Subsequent to a finding that Respondent's child, Maurice, was in need of assistance, the Baltimore City Department of Social Services agreed that Maurice should remain in Respondent's custody subject to supervision by the Department. This order was agreed to on August 18, 1987. Petitioner's supervision following this order was summarized by the Court of Appeals:

> There was evidence that DSS representatives had not seen Maurice since September 4, 1987; that the DSS aide's efforts to see Maurice were thwarted by Jacqueline's statements that the child was not at home; and that Jacqueline had told police that Maurice was in the care of an aunt, but that the aunt had denied seeing Maurice. (App. Pet. Cert. 19a n.2).

According to the summary of progress prepared by the Department, Petitioner (DSS) took increased interest in the case in March, 1988. (J.A. 81-82). As a result, by April 15, 1988, the following entry appears:

> T/C [telephone call] from Officer Klein at 4 p.m.: Officer Klein to refer case to homicide to Sgt. Landsmann. (396-272 Ms. Louise Perry had never seen the baby. Case looks kinky. Officer thinks Ms. Bouknight did something that has hurt Maurice. (J.A. 88).

Similarly, on April 18, 1988, it was noted:

> T/C to Det. James Jones; nothing new on case. Worker suggested photograph of mother and to

accompany Det. Jones. Det. Jones stated he would rely on cooperation of Ms. Bouknight. Worker emphasized the possibility of this being a murder case. (J.A. 90).

Entries for April 21 and 22, 1988, leave no doubt that a "*homicide*" is being investigated.

> T/C to Det. James Jones; Det. Jones advised that case should be regarded as a homicide and that no responsible employee of city or hospital had seen the child. (J.A. 93).
>
> * * *
>
> T/C to court clerk for Judge Angeletti; Eric McDonald worker quoted Det. James Jones, "that mother is going to have to help us." Worker suggested someone from Judge Angeletti's court to impress upon police the severity of the case, that Ms. Bouknight, according to Mr. Brown, did not stay in 1726 N. Washington Street on the night of 4/21/88. (J.A. 93).

The point was reiterated on April 26, 1988:

> T/C with Dot Rosinski, Chief of PS; Dot Rosinski to contact Youth Division of BCP on morning of 4/27/88, to request that greatest attention be given to the matter *as it is a possible homicide.* (emphasis added) (J.A. 95).

Again on May 4, 1988:

> T/C from Detective James Jones of the Youth Section, Baltimore City Police, 396-2042. Detective Jones requesting worker to meet with Detective Richard Falhteich of Homicide Division of Baltimore City Police (9:50 a.m.)
>
> * * *
>
> 11:00 a.m.—Interview of worker by Detective Richard Fahlteich of Homicide, Baltimore City Police at 500 East Baltimore Street, 396-2721 (J.A. 98).

The contempt proceedings themselves also reflect the interrelationship between the contempt action and the homicide investigation. Indeed, the contempt petition states, "this case was referred to the Homicide Division for further investigation due to concern over the welfare of the Respondent [Maurice]." (J.A. 38).

At the hearing on April 20, 1988, the hearing judge observed:

> The child representative, Ms. Watts, has joined in with the Department of Social Services. Apparently, a decision was made to terminate the foster care relationship even in light of the finding by Dr. Eisenberg that it is not recommended that she regain custody of the child, because it does not appear that she is emotionally capable of providing the protection, nurturance, and care that would be required for the child's safety and security.
>
> So, she is in need of intensive and extensive intervention both on emotional and social levels to help her deal constructively with not only her own internal issues but also those requirements for independent and self-sufficient functioning. What that tells me is we have a lady in a severe crisis here. *We also possibly have a dead child somewhere* which just depresses me to no end, I am not going to kid you. (emphasis added)
>
> Since Master Price has recommended the issuance of a warrant, and I have to sign the warrant, I am going to sign the warrant. I'd like to get in touch with somebody in the Police Department to have them go out and take a look into this situation as rapidly as possible. (J.A. 51-52).

The judge was then informed that DSS "had a Homicide detective downstairs in Juvenile Court." (J.A. 52).

After the judge had ordered the arrest of Respondent, counsel for Petitioner (DSS) advised:

> MS. BLIMLINE: Your Honor, if it would be possible too, if the police were sent out, Dr. Eisenberg was concerned that this girl not be treated in any kind of threatening way. He said emotionally, she is functioning at about an eight to ten year old level. So, he feels, especially with the suicide threat she has made, which he thinks we all should take very seriously, he thought the best thing to do was to deal with her as if she were a ten year old child, a very nonthreatening kind of approach.
>
> I don't know what happens when the police go out and pick someone up. But if they could be made aware of, if we ever expect to find out what happened with the child, that we're going to have to treat this lady very gently, I think. (J.A. 53)

Similar concerns were reiterated at the hearing held on May 18, 1988.

> MS. BLIMLINE: Your Honor, the Department would call the case of Maurice Lorenzo M Docket Number 887420. Marilyn Blimline representing the Baltimore City Department of Social Services.
>
> MS. WATTS: Lisa Watts, Legal Aid Bureau, representing the Respondent along with Mitchell Mervis.
>
> MR. LIPMAN: Your Honor, George Lipman and Robin Parsons representing Miss Bouknight. We have a preliminary matter.
>
> THE COURT: This is the time.
>
> MR. LIPMAN: If Your Honor please, at a prior hearing, I understand from Ms. Parsons, she asserted the Fifth Amendment right against self-incrimination and Article 22 of the Maryland Declaration of Rights regarding the right against self-incrimination on behalf of Ms. Bouknight. We are

very adamantly asserting those rights here again today.

> If Your Honor please, our position is that this contempt proceeding cannot continue. The contempt situation cannot continue because Miss Bouknight is being held because she is refusing to give up her Fifth Amendment rights against self-incrimination. That's our first preliminary matter.
>
> Our second preliminary matter for the record is we want to assert the Sixth Amendment right to counsel in questioning and the Fifth Amendment. If Your Honor please, I would proffer that in indicating to the State's Attorney's Office, Mr. Glushakow, who is with the Violent Crimes Unit of that office and who is in court today, and Mr. Cohen from the Juvenile Division of the State's Attorney's Office who is also in court today, we had a discussion approximately a half hour ago where to my surprise *I saw my client in the library of the Violent Crimes Unit on the third floor of this courthouse in the company of the detective.*
>
> Your Honor, at that point, I said to Mr. Glushakow and to Mr. Cohen and to the detective that we were asserting the Sixth Amendment right, and we did not want anyone talking to our client because we were representing her, we meaning Robin Parson and George Lipman of the Office of the Public Defender.
>
> So, Your Honor, we wish now to raise both the fifth and Sixth Amendment rights and we would like to present some testimony as to that, move for Your Honor to strike the contempt order and free Miss Bouknight from jail, and we want a record here which I think we just made that we are asserting our Sixth Amendment rights to the Baltimore City Police Department and to the other Police Department and State's Attorney for Baltimore City that we are representing her and we do not want her talked to by any law enforcement officials without our being present.

> And Your Honor, I would like to, if Your Honor please, it is quite elaborate, our motion on the Fifth Amendment. (emphasis added) (J.A. 103-104).

In sum, Petitioner (DSS) accepted all explanations of Maurice's seven month absence without further inquiry or investigation. At the end of that time, what amounts to a major homicide investigation was mounted, culminating in the contempt order.

SUMMARY OR ARGUMENT

I.

The Fifth Amendment privilege against self-incrimination reflects "a judgment . . . . that the prosecution should [not] be free to build up a criminal case . . . with the assistance of enforced disclosure by the accused," and is therefore implicated when asserted "to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government." *Doe* v. *United States*, 487 U.S. ___, 101 L.Ed.2d 184, 198-199 (1988). As the Supreme Court of Massachusetts recognized in *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239 (1980), a court order that makes the defendant seek out evidence for the state effectively forces the defendant to be a state's witness and, in this case, production of the child with any injuries would unquestionably permit Respondent to be prosecuted. Petitioner's authorities do not hold to the contrary: they are search cases having only a colorable claim to implicating the Fifth Amendment because of their peculiar facts.

Even were this not the case, "the validity of a claim of privilege turns upon what the answers conceivably may reveal . . . ." *Flager* v. *Derickson*, 134 Ariz. 229, 655 P.2d 349, 352 (1982). If the child is dead and his body no longer

in existence, Respondent is placed in "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964). Anything said that purges Respondent, under these facts, also tends to incriminate her.

II.

The history and purpose of the Fifth Amendment leave little room for balancing, and what little justification for balancing exists extends only to the "periphery," not the core, of the privilege. This case involves the core of the self-incrimination clause—use of the contempt power to force Respondent to disclose information the State's own agents acknowledge almost certainly will tend to incriminate her. The strong governmental interest asserted by Petitioners is no stronger than the governmental interest in convicting wrongdoers. Permitting such balancing would emasculate the privilege.

In any event, as the Department of Social Services appears to recognize (Pt. (DSS) B. at 32 n.25), Petitioners have failed to establish the predicate for balancing in this case: that balancing is necessary. Because a criminal sanction exists for failing to obey the trial court's lawful order to produce the child, Md. Cts. & Jud. Proc. Code Ann. § 3-831, the State's interest in protecting the child can be served without abrogating Respondent's privilege against self-incrimination.

ARGUMENT

I. A COURT ORDER DIRECTING A PARENT TO PRODUCE HER PREVIOUSLY ABUSED INFANT SON COMPELS INCRIMINATING TESTIMONY IN VIOLATION OF THE PARENT'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

The scope of the Self-Incrimination Clause was recently articulated by this Court:

It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosure of incriminating information. Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source . . . . The major thrust of the policies undergirding the privilege is to prevent such compulsion. The Self-Incrimination Clause reflects "a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosure by the accused."

* * *

> These policies are served when the privilege is asserted to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government. (citation omitted). *Doe* v. *United States*, 487 U.S. ____, 101 L.Ed.2d 184, 198-199 (1988).

One clear corollary of this analysis is that the state cannot compel the accused to "deliver the corpus delicti." *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N.E.2d 1239 (1980), *cert. denied*, 449 U.S. 900 (1980). *See also Goldsmith* v. *Superior Court In & For Shasta*, 152 Cal. App.3rd 78, 199 Cal. Rptr. 366 (1984).

In *Hughes*, police suspected the defendant of shooting at two people. They obtained a search warrant but were unsuccessful in finding the gun registered to Hughes. He was thereafter ordered to produce the gun or be found in

contempt. The *Hughes* Court noted that the production of the weapon would permit the state to have it examined in an attempt to connect it with the bullets found at the crime scene. It found this improper because, in making the defendant seek out evidence for the state, he was in effect forced to be a witness for the state. In the case at bar, the production of the child with any injuries would unquestionably assist the state in prosecuting Respondent for child abuse or related offenses.

Petitioners' attempt to liken this case to *Schmerber* v. *California*, 384 U.S 757 (1966), and its progeny is ill-founded. These cases are primarily *search* cases where a colorable self-incrimination claim arose only because of the unusual nature of the searches, *i.e.*, examination of the accused's person or characteristics of his person. The *Schmerber* Court was careful to limit its holding:

> The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it. Tests seemingly directed to obtain "physical evidence," for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the Fifth Amendment. Such situations call to mind the principle that the protection of the privilege "is as broad as the mischief against which it seeks to guard." *Id.* at 764.

None of these cases involves forcing the accused to search for evidence for the state. They do not involve, as does

Respondent's case, making the subject an agent or witness for the state.[1]

In any event, this case need not be decided on the narrow ground of whether the effect of producing the child is testimonial. The record demonstrates that the state believed this a homicide case at the time this contempt order was sought. Thus, the worst case scenario must be faced—with or without fault of Respondent, the child is dead and his body no longer in existence. "[T]he validity of a claim of privilege turns upon what the answers conceivably may reveal and not upon what the investigator anticipates uncovering." *Flager* v. *Derickson*, 134 Ariz. 229, 665 P.2d 349, 352 (1982). *See Slochower* v. *Board of Education of New York*, 350 U.S. 556, 557-558 (1956). This scenario places Respondent in "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52, 55 (1964).[2] By speaking to purge herself, she

[1] This distinction was recognized in *Doe*, *supra*, when the Court explained why signing the consent form in that case was not testimonial.

> The form does not even identify the relevant bank. Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence "by the independent labor of its officers." *Id.* at 200.

[2] On behalf of Maurice, the Legal Aid Bureau claims the mother "must affirmatively [raise] the issue of impossibility, . . ." (Pt. (Maurice) B. at 14). *See also* (Pt. (DSS) B. at 23). The illogic of this proposition long ago led to its rejection by this Court:

> However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Hoffman* v. *United States*, 341 U.S. 479, 486-487 (1951).

would provide information that unquestionably tends to incriminate her. *See Curcio* v. *United States*, 354 U.S. 118 (1957).

ARGUMENT

II. THE FIFTH AMENDMENT PRIVILEGE IS IMPLICATED BY A COURT ORDER TO PRODUCE A CHILD AND IS NOT OVERCOME BY ANY IMPORTANT SOCIETAL INTEREST IN PROTECTING CHILDREN IN JEOPARDY OF SERIOUS INJURY.

The nature of the privilege against self-incrimination leaves little room for balancing.

> The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and

> misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness. *United States* v. *White*, 322 U.S. 694, 698-699 (1944).

Because no reason exists for the government to try to force disclosures absent some need for the information, assertion of such overriding state interests is common in Fifth Amendment litigation. *Lefkowitz* v. *Turley*, 414 U.S. 70, 78 (1973). These assertions have been consistently rejected.

> We have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 (1977).[3]

What little *balancing* may be present in Fifth Amendment litigation[4] involves the *periphery* and not the *core* of

[3] Unsuccessful attempts to diminish the privilege against self-incrimination predate the adoption of the privilege in the constitution. The privilege evolved despite governmental attempts to compel evidence in support of prosecutions for treason, sedition and failure to support state sponsored religion. L. Levy, *Origins of the Fifth Amendment*, 324-332, 430-432 (2d ed. 1986). *See The King* v. *Lord George Gordon*, 99 Eng. Rep. 372 (1781) (the privilege may be exercised without restriction even where treason is charged).

[4] As *Levy, supra*, notes, the privilege evolved as a protection for the individual against the State's perceived overriding interest in its own preservation. By the time the Fifth Amendment was drafted, the privilege had developed to the point where it could be asserted without restriction even where, as in a treason case, the very existence of the State was threatened. *E.g. The King* v. *Lord George Gordon, supra*. Given this, it is difficult to imagine that the original intent of the amendment's drafters can be squared with any sort of balancing.

the privilege. A "narrow exception" has been recognized to the *Miranda* rule in the case of overwhelming and immediate pubic danger. *New York* v. *Quarles*, 467 U.S. 649 (1984).

However, police interrogations, by their very nature, do not involve the core of the privilege because the person interrogated does not face the "cruel trilemma." The police, absent illegal physical violence, have no means of compelling testimony, and what is said to the police is not under oath. Hence, there is no danger of perjury or contempt involved in police interrogations. *Quarles*, *supra* at 669-671 (O'Connor, J., concurring).[5] This point was emphasized in *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979).

> The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination. Balancing of interests was thought to be necessary in *Harris* and *Hass* when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

The rationale underlying the plurality opinion in *California* v. *Byers*, 402 U.S. 424 (1971), places that opinion

[5] *People* v. *Salinas*, 131 Cal. App. 3d 925, 182 Cal. Rptr. 683 (1982), cited by Petitioners, is arguably similar to *Quarles*. A mother replied to questions by a police officer and a physician relating to her severely injured child. The appellate court held that the interrogations were not in violation of the *Miranda* rule because Ms. Salinas was not in custody. In *dicta* the court noted that under such an extreme emergency questioning might be permissible in any event without giving *Miranda* rights.

on the periphery of the Fifth Amendment privilege. In *Byers*, this Court considered the effect of a California statute requiring that a motorist involved in an automobile accident must supply his name and address and not leave the scene. The plurality noted that the statute was not aimed at a group particularly suspected of criminal activity, that the acts required were "neutral", and that the state purpose served by the statute was "always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries." *Id.* at 433. Two of these rationales distinguish *Byers* from this case, in which the core of the Fifth Amendment privilege is involved, while the third acknowledges the primacy of the privilege when its core is implicated. *Byers* involved a neutral state regulation; Respondent is the subject of a homicide investigation, and is being ordered to disclose the whereabouts of her supposed victim.

This case involves the core of the Self-Incrimination Clause—use of the contempt power to force Respondent to disclose information the State's own agents acknowledge almost certainly will tend to incriminate her. Any balancing in this case would result in the abrogation of the privilege. There is no principled way to limit the circumstances in which the privilege may be balanced away once a witness can be compelled to answer because of a "strong" government interest. Indeed, there is a "strong" interest in prosecuting wrongdoers in virtually every criminal case.[6] Recognizing that balancing of this sort

---

[6] This case involves the Fifth Amendment; therefore it is not necessary to discuss the possibilities of balancing with regard to every other amendment. Nevertheless, in attempts to draw analogies with the First Amendment, Petitioners demonstrate a persistent, fundamental misunderstanding of balancing in that context which calls for explanation. First, although there is not a gradation of importance between amendments, the language and purposes of different amendments are sufficiently dissimilar to preclude identical analysis. Specifically, at its core, the Fifth Amendment is, unlike the First Amendment, purely passive, *i.e.*, there is no Fifth Amendment analogy to forcing a child to forego a needed blood transfusion or having the child distribute leaflets. For example, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), involved limitations not on parents' right to practice their religion but on their "right" to have their children distribute leaflets. The *Prince* decision contained the caveat: "Our ruling does not extend beyond the facts the case presents." *Id.* at 171.

In sum, Petitioners have made the same mistake of confusing core and peripheral values in their analysis of the First Amendment that they have made in discussing the Fifth Amendment.

would emasculate the Fifth Amendment, one of its most hostile critics concedes that "almost no one would favor confining a man to jail until he takes the stand to testify to his own crime." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 Cinn. L. Rev. 671, 695 (1968).

Moreover, an independent problem with Petitioners' demand for balancing exists. Even where only the periphery of the right is involved, the first prerequisite for balancing is that it is necessary. The Court of Appeals of Maryland noted that Respondent "may be criminally punishable under § 3-831 of the Courts Article." (App. Pet. Cert. 53a). This means that a person who refuses a lawful order to produce her child may be prosecuted and incarcerated, and therefore that no limitation need be placed on her Fifth Amendment privilege to accomplish the state's purpose.

The Department of Social Services, aware of this crucial flaw in its analysis, attempts to mitigate the problem with a curious footnote.

> The court below perceived another, but plainly illusory, alternative. It concluded that "Bouknight's conduct may be criminally punishable under § 3-831 of the Courts Article." App. Pet. Cert. 531. *See also id.* 42a n.3. This conclusion is inexplicable on two grounds, one practical and one constitutional. Criminal prosecution is hardly a practical solution because it is not a speedy way to obtain a child who may be at imminent risk. Further, if Ms. Bouknight's conduct is constitutionally immunized, and that is the holding below, it is difficult to see how she can be prosecuted for this "constitutionally protected" activity. (Pt. (DSS) B. at 32 n.25).

People are routinely imprisoned on criminal charges. Why being imprisoned awaiting trial on a criminal charge would not encourage production of the child, while imprisonment for civil contempt would, is not explained by Petitioner and is, on its face, inexplicable. The second claim, that if Respondent cannot be made to incriminate herself, she cannot be prosecuted pursuant to § 3-831, is no more persuasive. The criminal prosecution is based on an act or omission. It does not depend on Respondent doing or saying anything, and therefore does not implicate the Fifth Amendment at all. Most certainly it does not depend on Respondent incriminating herself as to other possible criminal charges, *e.g.*, child abuse or murder.

Section 3-831 is a modern version of a means lawmakers have historically used to deal with similar problems without violating the privilege against self-incrimination. In seventeenth century England authorities were faced with the problem of mothers killing their illegitimate infants. Prosecution was difficult because of the need to prove that the infant had been born alive and killed rather than stillborn. The legislative response in 1624 was to make concealment of a birth a crime. Thus, the twin goals of

discouraging infanticide and not compelling evidence from the mothers were achieved. P. Hoffer and N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* 24-26 (1984). The same effect had been achieved even earlier in France by proclamation of a royal edict in 1556. *Gallick Reports* XXIII (1737). Legislatures can and have dealt with this and similar problems: the need to balance the Self-Incrimination Clause to achieve the desired result is non-existent.

Particularly in a case such as Respondent's, the state's attempt to declare a belated "state of emergency" is made with singular ill grace. The child had not been seen by social workers for seven months when the "emergency" was proclaimed. What constitutes an "emergency" is narrowly defined even when only attenuated Fifth Amendment rights under the Miranda Rule are implicated:

> Although it involves police question in part relating to the whereabouts of a gun, *Orozco* v. *Texas*, 394 U.S. 324 (1969), is in no sense inconsistent with our disposition of this case. In *Orozco* four hours after a murder had been committed at a restaurant, four police officers entered the defendant's boardinghouse and awakened the defendant, who was sleeping in his bedroom. Without giving him Miranda warnings, they began vigorously to interrogate him about whether he had been present at the scene of the shooting and whether he owned a gun. The defendant eventually admitted that he had been present at the scene and directed the officers to a washing machine in the back room of the boardinghouse where he had hidden the gun. We held that all the statements should have been suppressed. In *Orozco*, however, the questions about the gun were clearly investigatory; they did not in any way relate to an objectively reasonable need to protect the police or the public from any immediate danger associated with the weapon. In short there was no exigency requiring

immediate action by the officers beyond the normal need expeditiously to solve a serious crime. *Quarles, supra,* at 660 n.8.

In sum, Petitioners have demonstrated neither justification nor need to balance Respondent's concededly well-grounded fear of self-incrimination against any valid state interest. Even if the questionable proposition that balancing could be justified is accepted, the fact that procedures already exist to protect the legitimate interests of Petitioners preclude its application to this case. Their claims to the contrary amount to nothing more than an ill-disguised argument that an inquisitorial system is easier for the state than is an accusatorial system. It is easier, but is not better. The type of system advocated by Petitioners is strikingly illustrated by the Japanese system of justice prior to the American occupation in 1945.

> An American officer named Kimberling from the Public Safety Division walks into a Tokyo police station. His boss, Engle, has sent him to inspect the lock-ups. Kimberling talks with the Japanese station chief about the prisoner in the first cell. The prisoner watches them through the wood bars.
> "Why is this man here?"
> "For stealing a kitchen knife."
> "How long has he been here?"
> "Two months."
> "Two months for stealing a kitchen knife?"
> "Yes."
> "How long is his sentence?"
> "He hasn't been sentenced."
> "Why is he being held without a sentence?"
> "He hasn't been tried yet."
> "Why hasn't he been tried yet?"
> "He hasn't confessed yet."
> W. Triplett, *Flowering of the Bamboo* 29 (1985).

The privilege against self-incrimination is an explicit rejection of the inquisitorial method. "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized." E. Griswold, *The Fifth Amendment Today* 7 (1955). The decision of the Court of Appeals is not only historically and analytically correct; it is a necessary application of the privilege against self-incrimination. It should be affirmed.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

M. CRISTINA GUTIERREZ
Law Offices of
William H. Murphy, Jr.
and Associates
1007 North Calvert Street
Baltimore, Maryland 21202
(301) 539-6500

Counsel for Respondent

GEORGE E. BURNS, JR.*
JOSE F. ANDERSON
GEORGE M. LIPMAN
GARY S. OFFUTT
ROBIN PARSONS
Assistant Public Defenders
Office of the Public Defender
201 Saint Paul Place
Baltimore, Maryland 21202
(301) 333-4842
Counsel for Respondent
** Counsel of Record*